BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAN N. MARKOVICH	)	
Claimant	)	
	)	
VS.	)	
	)	
ORION FITTINGS, INC.	)	
Respondent	)	Docket No. 202,816
	)	
AND	)	
	)	
TRAVELERS INSURANCE CO.	)	
DODSON INSURANCE GROUP	)	
FIREMAN'S FUND INSURANCE CO.	)	
SUPERIOR NATIONAL INSURANCE CO.	)	
AIG CLAIMS SERVICES	)	
Insurance Carriers	)	

ORDER

The claimant as well as respondent and one of its insurance carriers, Dodson Insurance Group, requested review of Administrative Law Judge Robert H. Foerschler's Award dated September 16, 2002. The Board heard oral argument on March 11, 2003.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for the claimant. Mark E. Kolich of Kansas City, Kansas appeared for respondent and Dodson Insurance Group (Dodson). Matthew S. Crowley of Topeka, Kansas, appeared for respondent and Superior National Insurance Co. (Superior). Randall W. Schroer of Kansas City, Missouri, appeared for respondent and Travelers Insurance Co. (Travelers). Terry J. Torline of Wichita, Kansas, appeared for respondent and Fireman's Fund Insurance Co. (Fireman's). David F. Menghini of Kansas City, Kansas, appeared for respondent and AIG Claims Services (AIG).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant alleged a series of repetitive injuries to her upper extremities beginning in May 1992 and continuing each and every day worked before the date of the regular hearing on February 5, 2002. During this extended period of time, the respondent's workers compensation insurance coverage was provided by five different insurance carriers with six periods of coverage.

The Administrative Law Judge (ALJ) awarded claimant a 10 percent scheduled disability to the left upper extremity and assessed that award against respondent and Travelers. The ALJ also awarded claimant a 21 percent scheduled disability to the right upper extremity and assessed that portion of the award against respondent and Dodson.

Claimant requested review and argues that instead of two separate scheduled disabilities, she suffered a whole body impairment. Claimant argues that Dr. Edward J. Prostic was the only physician who examined her after her last surgery and his opinion that she suffered a 23 percent impairment to the whole body should be adopted. Because claimant continued to work for respondent at the time of the regular hearing, claimant did not request a work disability.

Respondent and its insurance carrier, Dodson, agreed with claimant that claimant's continued employment caused continued aggravation of her condition, but because claimant returned to the same job after her surgeries Dodson argued there has not been an attenuating event to determine the date of accident. In the alternative, Dodson argued that because claimant continued to aggravate her upper extremities the date of accident would be outside Dodson's coverage period. Dodson concedes claimant had surgery to her left elbow on March 12, 1996, during its coverage. Consequently, Dodson notes that if there is a basis for assessing a portion of the award against it, any such award should be limited to the 5 percent Dr. Prostic assessed for the left elbow impairment.

Respondent and its insurance carrier, Fireman's, note that during its period of coverage claimant received treatment for her right wrist and elbow and was released to her regular job duties. Fireman's argues that because claimant's condition continued to worsen each day worked up to the date of the regular hearing, that date, February 5, 2002, should be adopted as the date of accident.

Respondent and its insurance carrier, AIG, argues its coverage did not begin until a few months before the regular hearing in this case and assessment of any portion of the award against it would not be equitable. AIG had coverage from December 1, 2001 to the present. AIG argues claimant last received medical treatment and was provided permanent impairment ratings before it provided coverage for respondent. Consequently, AIG argues applying a strict last day worked rule should not be applied where, as here, claimant continues working at the same job. AIG further argues that it cannot be considered public policy to burden whichever carrier has coverage on that last day where

that carrier did not provide coverage when treatment was provided and claimant was rated. Lastly, AIG notes that if liability is imposed against it, such determination would encourage respondent's insurance carriers to delay litigation and resolution of repetitive trauma cases until a new carrier has coverage, thus manipulating the date of accident.

Respondent and its insurance carrier, Travelers, note Travelers provided coverage from December 1, 1991, to December 1, 1994. Claimant was provided treatment but released to return to work with no recommendation for additional treatment. And Dr. Prostic noted her subsequent work activities worsened her condition. Consequently, Travelers argues claimant's date of accident is well after its coverage ended in 1994.

Respondent and its insurance carrier, Superior, agree with Dodson that the date of the regular hearing is the appropriate date of accident under the facts of this case because claimant continued working and the medical testimony established she continued to suffer repetitive injuries to her upper extremities. In the alternative, Superior argues its liability would be limited to 5 percent to the right upper extremity based upon Dr. Prostic's testimony that between March 31, 1999, and December 26, 2000, the impairment to claimant's right upper extremity increased 5 percent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This case demonstrates the difficulty in determining a date of accident in repetitive trauma cases especially where following treatment, including several surgeries, the claimant returns to work for the same employer performing the same job duties. Perhaps the better rule would be to assess joint and several liability against respondent and each of its insurance carriers that provided coverage during the series and time period of accidents with the carriers then to seek apportionment of their respective liabilities in District Court. Although this procedure has merit, such is not the law.[1]

The facts are essentially undisputed. Claimant began her employment with respondent as an assembly line worker in 1978. Claimant then became a machine operator and has performed that job for over ten years. The job required repetitive use of her hands and arms taking parts from the machine as well as trimming the parts.

Claimant initially had complaints in May 1992 of left hand and thumb pain. Thereafter, over the intervening years the claimant received medical treatment for a variety of complaints to her upper extremities. Claimant was treated for and diagnosed with

[1] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

overuse tendinitis of the wrist extensor tendons; right severe lateral epicondylitis; mild sprain of the right hand and wrist; de Quervain's syndrome of the left wrist; overuse syndrome of her right shoulder; tendinitis in her right elbow and left thumb; tendinitis in both wrists; tendinitis of her elbow and finally lateral epicondylitis of the left elbow. The treatment for these various conditions covered the time period from May 1992 through March 1996.

Ultimately claimant underwent surgery to her left elbow by Dr. William O. Reed Jr., on March 12, 1996, for lateral epicondylectomy. After postoperative occupational therapy claimant was released to her regular job duties in approximately May 1996. In early February 1997, claimant sought treatment for right arm discomfort and by April 1997 was diagnosed with multiple areas of tendinitis and carpal tunnel syndrome related to overuse. Claimant continued to receive conservative care until an endoscopic decompression of the right median nerve at the wrist as well as right ulnar nerve at the wrist was performed by Dr. Reed on June 1, 1998.

On March 31, 1999, Dr. Edward Prostic examined claimant and opined that beginning in 1992 she had continued to sustain repeated traumas to both upper extremities from work. The doctor recommended additional treatment for claimant's right shoulder and right elbow. The doctor then provided claimant with a 25 percent rating to the right upper extremity and a 10 percent rating to the left upper extremity which combined for a 20 percent permanent partial impairment to the whole body.

Claimant continued to complain of upper extremity difficulties especially her right shoulder and in May 1999 was diagnosed with recurrent right carpal tunnel syndrome, medial and lateral epicondylitis, right de Quervain's synovitis and right subacromial bursitis.

The ALJ ordered an independent medical examination of the claimant be performed by Dr. Truett L. Swaim. Dr. Swaim diagnosed overuse syndromes of both upper extremities and rated claimant with a 21 percent impairment of the right upper extremity and a 10 percent impairment of the left upper extremity which combined for a 17 percent permanent partial impairment to the whole body. Dr. Swaim further recommended additional diagnostic testing and treatment for shoulder impingement syndrome.

Claimant continued to receive treatment for her right shoulder. Ultimately, on March 2000, Dr. Craig Satterlee performed a subacromial decompression and excision of the distal clavicle on claimant's right shoulder. Following post-operative physical therapy, claimant was determined to be at maximum medical improvement on July 27, 2000, and she returned to her regular job duties. But because claimant continued to have right index finger joint problems an evaluation by a hand surgeon was recommended.

On December 26, 2000, Dr. Prostic again examined claimant and reiterated that it was his opinion that her ongoing employment activities since May 1992 caused claimant repeated minor trauma to both upper extremities. The doctor noted claimant had lateral

epicondylectomy of the left elbow, median and ulnar decompression of the right wrist and decompressive surgery to the right shoulder. And the doctor noted on examination claimant evidenced recurring entrapment of the median and ulnar nerves of the right upper extremity for which he recommended additional diagnostic testing and likely additional decompressive surgery. The doctor rated claimant at 30 percent to her right upper extremity and 10 percent to her left upper extremity which combined for a 23 percent permanent partial impairment to the whole body.

Claimant continued working at her regular machinist job until approximately a week before the regular hearing in this claim, at which time she indicated that she had been placed in a different job because she had hurt her right hand. The new job required claimant to place wire in a machine and then push two buttons for the machine to operate. It was admitted this job required repetitive use of both arms. Claimant noted that as she continued working her arms and shoulders hurt her more.

The Workers Compensation Act recognizes two classes of injuries other than those which result in death or total disability, and those are permanent disability to a scheduled part of the body and permanent partial general disability.[2] "When a specific injury and disability is a scheduled injury under the Workmen's Compensation Act, the benefits provided under the schedule are exclusive of any other compensation."[3] K.S.A. 44-510c(a)(2) has been extended by case law to allow compensation for certain combination injuries based on permanent partial disability.[4]

Both Dr. Prostic and Dr. Swaim testified that claimant's employment with respondent caused repetitive trauma and continued aggravation to her parallel upper extremities. Dr. Prostic specifically testified that the repeated traumas occurred from May 1992 onward.

In *Murphy,* the Supreme Court held that simultaneous aggravation to both arms and hands through repetitive use removes the disability from a scheduled injury and converts it to a general disability. "Where a claimant's hands and arms are simultaneously aggravated, resulting in work-related injuries to both hands and arms, the injury is compensable as a percentage of disability to the body as a whole under K.S.A. 44-510e."[5] In *Honn,* the Supreme Court noted that the schedule of injuries found at R.S. Supp. 1930, 44-510(3)(c)(1) to (20) failed "to provide compensation for both members when they are

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[2] *See* K.S.A. 44-510d; K.S.A. 44-510e.

[3] *Berger v. Hahner, Foreman & Cale, Inc.*, 211 Kan. 541, 545, 506 P.2d 1175 (1973).

[4] *See Hardman v. City of Iola*, 219 Kan. 840, 844, 549 P.2d 1013 (1976); *Downes v. IBP, Inc.*,10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[5] *Murphy v. IBP, Inc.*, 240 Kan. 141, 145, 727 P.2d 468 (1986); *See also Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, Syl. ¶ 1, 947 P.2d 1 (1997).

in pairs."[6] The Court then analogized to the permanent total statute and concluded that "when two feet are injured, as in the case before us, the compensation should not be computed for each one separately, as for the injury to one foot as provided by the schedule, but should be computed [as a body as a whole injury]."[7] K.S.A. 44-510c(a)(2) has been amended since *Honn* and now provides, in relevant part, "[l]oss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability."

Finally, in *Pruter,*[8] the Kansas Supreme Court reaffirmed the applicability of the *Honn* rule to the loss of use of parallel limbs that caused substantial impairments. While *Pruter* dealt with simultaneous injuries, the Board believes the rule is likewise applicable where repetitive trauma injuries are treated as a single accident.

The Board finds the Supreme Court's analysis in *Pruter*, coupled with the language of K.S.A. 44-510c(a)(2), requires an award based upon a general body disability and not two separate scheduled injuries under K.S.A. 44-510d. Because Dr. Prostic provided the only rating after claimant's last surgery, the Board adopts his opinion that claimant suffered a 23 percent permanent partial functional impairment to the whole body.

Following creation of the bright line rule in the 1994 *Berry*[9] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[10] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant

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[6] *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

[7] Id at 458.

[8] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[9] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[10] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

> performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[11]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

There appears to be a connecting thread between the decisions beginning with *Berry* that address the date of accident issue in cases involving injuries from repetitive trauma. It is a variation of the last injurious exposure rule previously followed in occupational disease cases. (The similarity between repetitive trauma injuries and occupational diseases was not lost upon the Court in *Berry* when it described one such condition, carpal tunnel syndrome, as "neither fish nor fowl.") A claimant's last injurious exposure to repetitive or cumulative trauma is when he or she leaves work. But when the claimant does not leave work or leaves work for a reason other than the injury, then the last injurious exposure is when the claimant's restrictions are implemented and/or the job changes or job accommodations are made by the employer to prevent further injury.

> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[12]

In this case, claimant received treatment, including surgeries, but always returned to the same job. Claimant continued to work and her symptoms continued to worsen. After her surgeries claimant continued to perform the same job but her symptoms have continued to worsen and she suffered additional permanent injury. Claimant testified at the regular hearing that she continued to perform the same job until a week before the regular hearing. But she was moved to a different machine which still required repetitive use of her bilateral upper extremities. It cannot be said this change to a different machine was an accommodated job.

Under *Treaster*, if claimant has an injury, the date of accident will be either the date claimant leaves work due to her injury or when new or additional restrictions are imposed by a physician and implemented by respondent by making further job accommodations. Under the facts presented, that date has yet to occur. Claimant was continuing to do the same or similar work on the same type of machines that she did before her surgery and she continued to aggravate her condition "each and every working day" through to the date of the regular hearing and, presumably, beyond. Therefore, setting an accident date is a problem. Nevertheless, claimant has decided not to wait upon the occurrence of some

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[11] Id. at Syl. ¶ 3.

[12] *Treaster*, Syl. ¶ 4.

legal fiction to establish a date of accident in order to obtain an award of permanent disability benefits.

The Board finds the rationale of *Depew*, *Berry* and *Treaster* require a finding that claimant suffered one accident and one injury and that benefits should be awarded under a single accident date which, in this case, is the date of regular hearing. This is the date claimant alleged she was at maximum medical improvement. Respondent did not object and the ALJ allowed the trial of the case to proceed.

It must be remembered that the bright line rule first announced in *Berry* is intended to establish a single date of accident for the purpose of computing the award. This does not mean that the injury in fact occurred on only one day. By definition, a repetitive trauma injury occurs over a period of time. The fact that we are dealing with a series of accidents cannot be lost sight of when determining a single "date of accident" for legal purposes in applying the Workers Compensation Act. Consequently, the date of accident is February 5, 2002.

The Board modifies the ALJ's Award to assess liability against AIG for claimant's permanent partial disability compensation. The Board is not unmindful that the determination of the date of accident in this case places liability for compensation upon AIG for a permanent partial disability that was rated before that carrier had coverage. To the extent determination of this date of accident may result in certain inequities when ascribing liability between successive/multiple insurance carriers of a single employer/respondent is given little consequence.

> We fail to see why the rule laid down in Berry should not be applied equally in a case where the dispute is over coverage between two insurance companies. The actual date of injury is very difficult to pinpoint in these cases, but the last day of work is not. This case is controlled by Berry.[13]

The Board concludes that claimant suffered additional aggravation to her upper extremities each time she returned to the same job she had performed before her various treatments and surgeries. Because claimant continued to aggravate her condition after each surgery, the last day worked rule is applicable.[14] The Board further determines that each insurance carrier is responsible for payment of the benefits incurred during its period of coverage such as medical expenses or temporary total disability compensation benefits.[15]

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[13] *Anderson v. Boeing Co.*, 25 Kan. App. 2d 220, 222, 960 P.2d 768 (1998).

[14] *Lott-Edwards v. Americold Corp.*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[15] Id. at Syl. ¶ 9.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler's dated September 16, 2002, is modified to reflect a February 5, 2002, date of accident, and that claimant suffered a 23 percent permanent partial impairment.

The claimant is entitled to 17.86 weeks temporary total disability compensation at the rate of $215.57 per week or $3,849.06 to be paid by Dodson plus 5.29 weeks temporary total disability compensation at the rate of $242.95 per week or $1,284.16 to be paid by Fireman's plus 1.14 weeks temporary total disability compensation at the rate of $264.74 per week or $278.88 to be paid by Fireman's plus 4.14 weeks temporary total disability compensation at the rate of $262.66 per week or $1,087.44 followed by 92.36 weeks permanent partial disability compensation at the rate of $286.88 per week or $26,496.24 to be paid by AIG for a 23 percent functional whole body disability, making a total award of $32,995.78.

As of September 19, 2003, there would be due and owing to the claimant 17.86 weeks of temporary total disability compensation at the rate of $215.57 per week in the sum of $3,849.06 plus 5.29 weeks temporary total disability compensation at the rate of $242.95 per week or $1,284.16 plus 1.14 weeks temporary total disability compensation at the rate of $264.74 per week or $278.88 plus 4.14 weeks temporary total disability compensation at the rate of $262.66 per week or $1,087.44 plus 56.14 weeks of permanent partial disability compensation at $286.88 per week in the sum of $16,105.44, for a total due and owing of $22,604.98, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $10,390.80 shall be paid at $286.88 per week for 36.22 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September 2003.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and Dodson Insurance Group
Matthew S. Crowley, Attorney for Respondent and Superior National Insurance
Randall W. Schroer, Attorney for Respondent and Travelers Insurance
Terry J. Torline, Attorney for Respondent and Fireman's Fund Insurance
David F. Menghini, Attorney for Respondent and AIG Claims Services
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director